A. The Exclusive Affiliation Rule Is Essential To Assure That Emerging Networks Will Have Sufficient Access To Stations Nationwide

1. History And Purpose Of The Rule

The exclusive affiliation and time-option rules were adopted precisely because exclusive affiliation practices were rampant within the unregulated radio broadcast industry. At a time when that industry had similar structural limitations, the two dominant firms -- NBC and CBS -- engaged in a standard practice of obtaining exclusive affiliation agreements with their stations.[31] In adopting the exclusive affiliation rule, the Commission observed:

> The evidence is convincing that the purpose, as well as the effect, of exclusive affiliation, is to prevent the growth of other national networks.[32]

Coupled with the fact that the two networks had "tied up the largest stations in the most desirable markets," the Commission found that the difficulties of establishing a competitive new network would be "well-nigh insurmountable."[33]

Today, the exclusive affiliation rule functions to prevent any network from precluding a station from airing the programs of another network. In effect, the rule serves to permit choice and control over programming by the individual affiliate, and to preserve a vital lifeline for emerging networks. Certainly, a powerful incumbent network with a primary affiliation will have significant leverage over a station in negotiating its schedule and the amount of clearance afforded to it. Aside from its FCC license, an affiliation with a national network is a station's most valuable asset; as such, there will be considerable

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31. See Chain Broadcasting Report at 35-36.

32. Chain Broadcasting Report at 51.

33. Id.

institutional reasons why an affiliate may prefer to defer to its primary network when making decisions about program clearance.[34] In light of this leverage, the rule is crucial in preserving a modicum of affiliate choice and opportunity for new network entry and competition.

2. Network Incentives To Engage In Entry-Deterring Practices Have Long Been Acknowledged And Remain Today

As the NPRM recognizes, anti-competitive behavior by an established network would be natural: "existing networks have an incentive to block entry by new networks in order to maintain their existing market positions."[35] Indeed, the Network Inquiry Report identified this entry-deterring incentive as existing inherently within the structure of networking: the entry of a new network does not increase overall television viewership, but rather leads to a decrease in the other networks' market share. Given the strong structural incentive to deter new network entrants, it is not surprising that one of the established networks recently warned its affiliates against entering into a secondary affiliation with one of the emerging networks. The network cautioned that "to become a secondary affiliate of one of the emerging 'fifth networks' is to head down 'an absolute and irreconcilable collision

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34. Indeed, as Capital Cities/ABC, Inc. noted recently in the pending proceedings on the television advertising regulations, network programs have a 97.7 percent clearance rate by their affiliates in prime time. Comments of Capital Cities/ABC, Inc., at 7, MM Docket 95-90 (released Aug. 28, 1995). See also, Network Broadcasting Report at 638; Telecommunications Law and Policy at 230.

35. NPRM, ¶ 19. See also Network Inquiry Report at 479, 521 ("The dominant networks have every incentive to attempt to prevent further network entry. . . .").

course' with the network."[36] That warning was issued only two days after UPN announced that it had obtained 21 new secondary affiliations, 17 of which were with stations serving as primary affiliates for the network in question. This warning proves that the incentive and tendency toward entry-deterring behavior is much more than theoretical. In the absence of the exclusive affiliation rule, an established network could do much more than merely express its dissatisfaction with affiliates contemplating secondary affiliations with competing, emerging networks.

3. Cost/Benefit Analysis

The exclusive affiliation rule represents a minor regulatory intervention, one whose benefits far outweigh it costs. As to the modesty of its remedy, the mere potential to air the programs of other networks that is preserved by the rule is in no manner coercive. Although the *potential* for access is reserved by the exclusive affiliation rule, it does not ultimately dictate either the content or the source of the affiliate's choice of programming, as did the former prime-time access rule. The rule simply preserves choice and autonomy for the affiliate; by doing so, it preserves an opportunity, but no guarantee, for emerging networks to build a nationwide distribution base. In short, the rule is addressed to equal opportunity, rather than coerced choice. Most importantly, the opportunity for access afforded new entrants serves the public interest in fostering competition. The emerging network does not gain an unfair competitive advantage; it merely gains the opportunity to

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36. Lisa de Moraes, Hollywood Reporter, Oct. 14, 1994, at 1-2. See also David Tobenkin, Broadcasting and Cable, Oct. 17, 1994, at 14.

prove itself as a source of valuable and desirable programming, and to emerge as a viable competitor.

In contrast to these significant advantages afforded by the rule, the costs of an exclusive affiliation rule are slight. True, there may be theoretic economic efficiencies to a network's ability to control all twenty-four hours of an affiliate's program slate. In the ultimate scale of the public interest, however, the potential for this minimal economic gain pales in comparison to the decrease in consumer and affiliate choice rendered by the resulting barrier to entry. Moreover, the rule does not impose measurable losses in efficiency concerning goodwill or consumer recognition. A primary network may still promote itself and its programs as much as it desires.

The true danger of exclusive affiliation practices is that when used as intended, their effect is intensely anti-competitive. Whatever potential benefits accorded by exclusive affiliation exist, if any, those benefits are marginal in comparison to the substantial benefits to competition and diversity generated by new network entry. For these reasons, the

Commission should retain the exclusive affiliation rule.[37] Without it, UPN, as an emerging network, would be forced from the air.

B. The Time-Option Rule Should Be Modified To Permit Optioning By Emerging Networks

1. History And Purpose Of The Rule

The NPRM in this proceeding rightly reflects the potential duality of the time-option rule: it acknowledges the promise of the practice's utility to new entrants, while recognizing the opportunity for misuse by established firms, who may not wish to plan for future programming, but rather to obstruct others from doing so. Such had been the practical experience in networking prior to the adoption of the rule. Though the predecessor to the CBS radio network found optioning to be a useful tool for planned growth, by the time the Commission issued the Chain Broadcasting Report in 1941, CBS, although firmly

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37. Although UPN is sympathetic to the approach of retaining the rule in "small" markets and repealing it in "large" markets, as proposed in the NPRM, on balance UPN believes that a partial repeal of the exclusive affiliation rule presents substantial practical, policy and administrative difficulties. First, as revealed above, the numbers of stations per market would not support a "large market" categorization in any but a handful of markets. Second, and more importantly, the critical issue is not the size of the market alone, but rather the number of potential qualified affiliates in each market. The technical and format issues discussed above reveal precisely how difficult it is to quantify the number of "qualified" affiliate stations per market. Third, the definition of what constitutes an "adequate" number of local broadcast outlets depends upon how many networks the Commission wants to encourage. A 4-station market may be "large," with an "adequate" number of stations, if the Commission is prepared to denominate a 4-network universe as satisfying the public interest in competition and diversity. By contrast, a 5-station market may be "small," with fewer than an adequate number of outlets, if the Commission were to hope for a 6 or more network universe. Finally, much of the value of the rule to affiliates lies in its clarity: as a market grew or diminished, so the rule's boundaries and its application would shift and become uncertain. As such, and because a "large market" definition would apply to so few, UPN opposes any partial repeal of the exclusive affiliation rule.

established, had adopted a standard contract practice of obtaining an option on all of an affiliated station's time.[38] NBC engaged in similarly obstructive practices. Recommending a flat ban on time-optioning, the Commission observed that the practice, when uncontrolled, granted the established networks great and unnecessary advantages at the expense of both new entrants and local affiliates.

Under then-standard practice, the established networks exercised their options subject only to notice of 28 days. As such, local stations could neither make long-term programming decisions nor enter into effective contracts for the sale of advertising time. The Commission observed:

> [S]hifting a local commercial program may seriously interfere with the efforts of a sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service.[39]

Likewise, the power to option any or every hour of a station's time was, in a world of insufficient outlets, tantamount to the power to keep any rival off of the air. Incumbent networks could, by selective use of time-optioning practices in critical markets, disrupt the ability of an emerging network to obtain the clearances needed to achieve viability. The Report concluded that "[the] contractual right to utilize the time of those stations on 28 days' notice gives [an established primary network] the whip-hand over any other network broadcasting over these stations."[40] Indeed the report catalogued the

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38. Chain Broadcasting Report at 36-37.

39. Id. at 63.

40. Id.

experiences of a rival emerging network (Mutual), which repeatedly lost programs in an embryonic stage of development because it could not guarantee sponsors when, or whether, its programs would be aired. Thus, in addition to harboring concerns about the health of affiliate autonomy, the Commission was persuaded that time-optioning, in the hands of an established network, could all too easily become an anti-competitive, entry-deterrent device. "Th[e] uncertainty in the availability of NBC's affiliates to other networks places a serious obstacle in the way of the development of new networks."[41]

2. The Role Of The Rule Today

Today the time-option rule prohibits agreements between a network and an affiliate whereby the network may reserve an option on the station's time without actually committing to use it. In practical effect, it is an alternative version of -- and critical supplement to -- the exclusive affiliation rule, for it assures that non-affiliated networks may compete for access to a station's time. Again, the rule is directed to procedural, rather than substantive, concerns: in no way does it prevent a station and a network from agreeing to air any program. The Commission has always recognized the inseparable link between exclusivity and time-optioning as anti-competitive, entry-deterrent devices: back in 1941 the Commission warned, "as a practical matter, it is not unlikely that, even if exclusivity as such were eliminated, the present network optional-time provisions would, unless likewise eliminated, perpetuate exclusivity."[42]

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41. Id. at 63-64.

42. Id. at 64. Again, the Commission observed:

Unlike exclusivity, however, time-optioning is not an all-or-nothing proposition. Theoretically, the purpose of such an arrangement is to promote planned, gradual and stable growth. As such, it is logical to make distinctions among those whose objective it is to grow and those whose objective it is to maintain a status quo by impeding the growth of others. The NPRM has already made this distinction, acknowledging that "[w]hile the Commission's prohibition on time optioning may not impose a significant impediment to established networks, it might inhibit the growth of new networks." NPRM at ¶ 30. For established networks, the pro-growth rationale of the practice holds very little promise; established networks can comfortably commit to use a block of time because they have a store of programming.[43] Furthermore, at an average of 15-22 hours per week of prime time programming for the three older, established networks, there is little, if any, actual need for further prime time growth. The attractiveness of the practice's entry-deterring potential, however, poses significant hazards to newcomers.

It is quite natural that, when considered from the perspective of a new entrant, the balance of potential utility and potential harm becomes reversed. For an emerging network like UPN, the ability to option time would allow flexibility in the planning of the

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> [E]ven without these exclusivity clauses, time sold to a new national network would be subject for the most part to options on 28 days' notice--thus preventing the development of an effective program series. Thus each doorway into the network field is both locked and bolted. Id. at 75 (emphasis added).

43. Notably, both the Chain Broadcasting Report and the Network Broadcasting Report voiced great skepticism about the suggestion that time-optioning offered much of value (beyond mild convenience and substantial anti-competitive power) to established networks. See Chain Broadcasting Report at 65; Network Broadcasting Report at 643.

growth of its schedule over a period of years. Before a show went into production, the network could obtain the assurance -- and the advertisers could obtain the guarantee they require -- that a proposed program would achieve national clearance upon its debut. Indeed, funding for the production of a new program in a new time period is very often contingent upon the demonstrated commitment of advertisers to support that show; that commitment, in turn, depends upon a demonstration of nationwide clearance. When a network currently airs only four hours of prime time programming per week, an expansion in the next season to six hours in prime time is substantial. So is the risk--the financial exposure. Yet if a network already airs twenty-two prime time hours per week, a similar addition of two new hours is proportionally insignificant. Furthermore, the notion that an emerging network could use time-optioning offensively, in an entry-deterring manner, against established networks, is at once amusing and economically untenable.

3. A Modification Of The Time-Option Rule To Permit Optioning By Emerging Networks Will Augment The Rule's Pro-Competitive Intent And Effect

Based on the foregoing analysis, UPN proposes that the Commission add a definition of "network" to the time-option rule, to clarify that the rule's prohibition encompasses established networks for whom the rule's promise lies only in its entry-deterring potential. Such a definition would be drawn along lines of market occupancy (to protect against abusive time-optioning practices) and utility (to assure that those who would benefit from the use of time-optioning practices are permitted to do so). As it is written today, the rule is inadequately tailored to the Commission's desire to avoid inhibiting the emergence of newly competitive networks and to foster diverse programming choices. In an effort to prevent well-established networks from using time-optioning to block competitors from access to outlets, the rule paints with too broad a brush.

Adoption of a definition of "network" focusing on those with a firmly established existence and substantial program schedule would allow the Commission to use this structural rule to its greatest pro-growth, pro-competitive effect. The exception permitted for incipient networks would be appropriately limited as follows: an aspiring new network could engage in time-optioning only until it became economically viable, as determined by a combination of national coverage and prime time programming hours. Thus, the proper definition of "network," for purposes of the time-option rule alone, would consist of a network that has attained a combination of both (1) 85 percent coverage through primary affiliations, and (2) 15 hours of prime time programming per week.

As discussed above, coverage of over 80 percent is the baseline below which a network will be unable to attract any national advertising. Once a network reaches 85 percent primary coverage, however, it will no longer be dependent on secondary affiliations. At 85 percent coverage a network will be viable, but hardly dominant: economically, there is a quantum difference between networks at 85 and networks at near-universal coverage, suggesting that such a cut-off will encompass a network of any strength that might attempt to use time-optioning in an anti-competitive manner. On the other hand, by requiring 85 percent primary coverage, the Commission will assure that a network coming within the scope of the definition will have the consistent, dependable and independent distribution base necessary to satisfy advertisers. As discussed above, primary affiliates tend to clear the programs of their networks at an even higher rate than do secondary affiliates. Furthermore, coverage through primary affiliates is the figure which most interests advertisers. Thus once a network has attained 85 percent primary coverage, it has substantially less need to option time in order to assure advertisers of clearance.

A second criterion of 15 hours of prime time programming is structured so that only emerging networks may truly benefit from the advantages of time-optioning. For until a network has a substantial slate of prime time offerings, it will be in a mode of growth. Fifteen hours of prime time programming represents a reasonable 7-day prime time schedule of 2 hours per night and 3 hours on Sunday. As has been recognized by the Commission in another context, a benchmark of 15 hours in prime time would permit incipient networks to attain "a meaningful but still partial presence in the most profitable broadcasting period."[44] UPN agrees that a 15 hour prime time presence is a useful benchmark in distinguishing between that point in a network's growth where time-optioning is a pro-competitive, pro-growth tool, and that point where time-optioning can be used to stifle competition and limit growth.

Indeed, the Commission has previously recognized the value and the validity of drawing regulatory distinctions between established and emerging networks. Under the prior financial interest and syndication rules,[45] emerging networks were exempted from

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44. Report and Order, 6 FCC Rcd. 3094, 3150, ¶ 157 (released May, 29, 1991)(fin/syn proceedings).

45. The financial interest and syndication rules previously were contained at 47 C.F.R. §§ 73.659 through 73.662 See Report and Order, MM Docket No. 95-39 (released Sept. 6, 1995) (final review of fin/syn rules) (repealing rules upon publication in Federal Register).

many of the limitations imposed on established networks.[46] See Second Report & Order, 8 FCC Rcd. 3282, 3331, MM Docket No. 90-162 (released May 7, 1993) ("[A]doption of an 'emerging network' exception removes a significant impediment to the development of competition with the major networks.") The Commission realized that application of the financial interest and syndication rules to an emerging network served only to artificially restrain the network's growth. In the interest of competition and fostering the growth of a fourth national network, the Commission created an "emerging network" exception. In furtherance of its goal of "promoting a fourth or even fifth national network," UPN urges that the Commission do the same today. 6 FCC Rcd. 3984 at ¶ 159.

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46. Under the rules, a "television network" was defined as any entity providing more than 15 hours of prime time programming to affiliates reaching 75 percent of television households nationwide. First Report and Order, 6 FCC Rcd. 3094 ¶¶ 145-58 (released May 29, 1991). After review by the United States Court of Appeals for the Seventh Circuit, the Commission amended the rules in 1993 to exempt all "emerging networks" from most of the fin/syn requirements. In turn, a network was deemed to be "emerging" if it did not meet the definition of network described above as of the date of the publication of the new rules (May 7, 1993). For purposes of logic rather than convenience, UPN agrees that the criteria of 15 hours of prime time programming is a useful breakpoint between emerging and established networks in the context of time-optioning as well. The 75 percent coverage criteria for fin/syn, however, was adopted in that context merely to distinguish between regional and national broadcasters. The Commission stated that it "never intended" to subject regional broadcasters to the rule and found that a 75 percent criteria "will distinguish substantially national networks from regional broadcasters." First Report and Order, 6 FCC Rcd. 3094 at ¶ 158. That purpose has no bearing upon the time-option rule. As such, and for the reasons described above, UPN believes that 85 percent primary coverage is much more appropriate determinant of a "network" for purposes of the time-option rule.

IV. Conclusion

In this rulemaking proceeding, the Commission is presented with the opportunity to do two things: to reaffirm its commitment to preserving opportunity for new network entry, and to further foster competition by affording new entrants a tool to assist them in planning their growth. Both of these opportunities serve the Commission's ultimate charge of encouraging healthy, vigorous competition in the public interest. As the Commission properly recognized in 1941, competition in the form of new entrants is essential if broadcasting is to be responsive to the needs of the public: "An open door to new networks will stimulate the old and encourage the new."[47]

This rulemaking arises at a uniquely apropos time in the history of television networking: after the firm establishment of the long-sought "fourth network" and the previously unimaginable emergence of a fifth and sixth network. If these great gains are to be preserved, it is incumbent upon the Commission to contemplate the purpose and effect of these two rules in the factual context of the needs of emerging networks. Though these rules are very modest in their regulatory prohibition, they are a condition precedent to the existence of UPN. In a world of structural limitations, the preservation of rules ensuring open access is essential. UPN asks not for a competitive advantage; it asks merely that it be permitted to enter the fray, and to compete on the merits of the public service it hopes to provide.

47. Chain Broadcasting Report at 88.

For the foregoing reasons, UPN urges that the Commission retain the exclusive affiliation rule in its present form and retain the time-option rule with a new exception permitting limited time-optioning by emerging networks.

Respectfully submitted,

UNITED PARAMOUNT NETWORK

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20544

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing Programming	)	
Practices of Broadcast Television	)	
Networks and Affiliates	)	

47 C.F.R. § 73.658(a), (b), (d), (e) and (g)

DECLARATION OF LUCIE SALHANY

I, Lucie Salhany, declare as follows:

1. My name is Lucie Salhany. I am the President and Chief Executive Officer of the new United Paramount Network ("UPN").

2. UPN is a new network of broadcast television stations, officially "launched" in January of 1995.

3. I have been the President and Chief Executive Officer of UPN since September of 1994, and as such, since that time, have had overall responsibility for its launch and operation.

4. Prior to being at UPN, I was Chairman of the Fox Broadcasting Company. In that capacity I had overall responsibility for the operation of the Fox television network. Before that, I headed Twentieth Television, the Fox division that produces network and syndicated television shows.

5. My other experience in the broadcast/communications industry includes the following: President, Paramount Domestic Television (1985-1991); Vice President, Television and Cable Programming, Taft Broadcasting (1979-1985); Program Manager, WLVI, Boston (1975-1979); and Program Manager, WKBF, Cleveland (1972-1975).

6. Based on my experience in broadcasting, and in particular on my experience as President of UPN, I believe that access to secondary affiliations plays a critical role in encouraging and facilitating new network entry.

7. In order to be viable as a recipient of national advertising, any network, whether emerging or not, must be able to deliver coverage of over 80 percent of homes nationwide.

8. Today, UPN's coverage is at 91 percent nationwide. Because there is an insufficient number of stations in a substantial number of markets to support primary affiliations, however, 19 percent of that 91 percent total coverage is obtained through secondary affiliations with stations already primarily affiliated with an established network.

9. Without access to those stations carrying UPN as a secondary affiliation, UPN's coverage today would be reduced to approximately 72 percent, a number insufficient to satisfy advertisers in the national marketplace. Thus, access to these affiliates is a condition precedent to UPN's existence today.

10. Based on my prior experience in broadcasting, I know that access to secondary affiliations serves as a transitional device for new networks. Secondary affiliations are certainly less desirable than primary affiliations, as advertisers pay a premium for display on primary affiliates because the accompanying guarantee of day and date allows them to

reach their targeted audience. Thus, an emerging network which must rely significantly upon secondary affiliations remains at a substantial competitive disadvantage. Nonetheless, those secondary affiliations serve as a critical transitional mechanism for new networks. They create a patchwork of coverage permitting the network to get on the air and compete on the merits of its programs; in turn, the presence of a new network provides the impetus for the addition of new stations in small and medium size markets. With the growth in overall and primary coverage that the addition of new stations permits, then that network will be able stand as a viable competitor on its own base of primary affiliations.

11. For these reasons, I believe that preservation of access to secondary affiliations is imperative. Use of secondary affiliations permits emerging networks both to (1) get on the air, and (2) make the transition from an emerging network to an established network reliant solely on its own base of primary affiliates. Given the structure of the market for stations today, however, no emerging network today could remain viable in the absence of access to secondary affiliates.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 26 October, 1995.

Lucie Salhany